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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 525

RUTH K. ARMSTRONG,

Petitioner,

vs.

LEE R. ARMSTRONG

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Ruth K. Armstrong, respectfully petitions this Honorable Court for a writ of certiorari to the District Court of Appeal, Second Appellate District, Division One, State of California.

Summary and Short Statement of the Matter Involved

The only issue presented to this Court is whether petitioner has been deprived of her constitutional right to due process of law as guaranteed by the 14th Amendment to the United States Constitution by the State of California. Specifically,

the issue involves petitioner's right to reasonable notice of hearing of a motion by respondent to set aside a judgment of divorce theretofore rendered in favor of petitioner and to a hearing on the merits.

The action was one for divorce filed by petitioner against respondent in the Superior Court of the State of California, in and for the County of Los Angeles (R. 1-2). Respondent was personally served with a copy of the summons and complaint in Los Angeles County on July 12, 1945, and on July 26, 1945, his default was duly entered upon his failure to appear or answer (R. 2). On August 14, 1945, petitioner was awarded an interlocutory divorce, custody of two minor children, and certain property pursuant to a property settlement previously entered into by the parties (R. 4-7).

On January 24, 1946, two days prior to expiration of the six-months' jurisdictional period wherein the court had power by statute to set aside the judgment, respondent filed a notice of application to vacate and set aside the divorce judgment on the ground that judgment was rendered "through and by reason of the mistake, inadvertence, surprise or excusable neglect of said defendant" (respondent) (R. 11-20). On January 24, 1946, respondent obtained an *ex parte* order from a Judge of the Superior Court, without affidavit or other basis, shortening the time of service of notice of said application to one day (R. 12).

On January 25, 1946, at 9:20 A.M., a copy of the notice of application was served on petitioner's then attorney of record, Marlan A. Proctor, Esq., who was then absent from his office, by leaving the notice at his office in Burbank, California, with his secretary (R. 21). Petitioner's attorney received the notice upon returning to his office between 10:00 A. M. and noon, January 25 (R. 31). The same day, at 5:05 P.M. respondent served petitioner's attorney with a copy of his affidavit in support of his application (R. 21). On January 25, petitioner was in Earlimart, Tulare County,

California, approximately 150 miles from Los Angeles, the place of hearing of the application, and on that day petitioner was personally served with a copy of the notice of application but not with a copy of respondent's said supporting affidavit (R. 22).

On January 26, 1946, at 10:30 A.M., at Los Angeles, which was the time and place set for hearing of the application, respondent made application to the Superior Court to set aside the divorce judgment. Petitioner made a special appearance through her attorney to contest the court's jurisdiction to vacate and set aside the divorce judgment on the ground of insufficiency of the time of notice of hearing of said application and on the ground that certain statutes providing for the manner of service of notice had not been complied with. Petitioner presented no evidence or counter-affidavits on the merits of the application (R. 22-23, 36). The Superior Court vacated and set aside the divorce judgment at said hearing on January 26, 1946 (R. 22-23).

On February 7, 1946, petitioner served on respondent and filed a notice of motion to vacate and set aside the prior order vacating the divorce judgment on the ground that she had been taken by surprise and that neither she nor her counsel had had any opportunity to prepare for or present any defense on the merits to the respondent's prior application (R. 27-29). Petitioner's said motion was subsequently heard and denied, the only issue presented and the only arguments made having been as to the reasonableness and adequacy of the notice given by respondent of the prior hearing on respondent's application, and as to the court's power to vacate the order previously made, respondent's counsel contending that the court had no power, in any event, to vacate the prior order (R. 35-68). Petitioner appealed to the Supreme Court of California from both orders (R. 7-8). The appeal was transferred by order of the Supreme Court to the District Court of Appeal

for hearing and determination which latter court affirmed said orders of the Superior Court by its decision filed on August 22, 1947 (R. 69-74).

Petitioner filed a petition for rehearing in the District Court of Appeal and said petition was denied (R. 75). Petitioner thereafter filed a petition for hearing in the Supreme Court of California, which petition was denied by order dated October 20, 1947 (R. 75).

Jurisdictional Statement

(1)

Statutory Provision Sustaining Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code, section 237(b), as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 [Title 28 U. S. C. section 344(b)] on the ground that a final judgment has been rendered or passed by the highest court of a State in which a decision could be had where was drawn in question and where a right was specially set up or claimed by petitioner under the constitution and that right denied. More particularly, this Court has jurisdiction to review the orders herein involved under the statute above referred to in that an important and substantial Federal question is presented, *viz.*, whether petitioner was denied her right to due process of law under the Fourteenth Amendment to United States Constitution by the State courts by reason of the fact that the judgment of divorce in favor of petitioner was vacated and set aside on respondent's application, petitioner having been given notice of the hearing of said application but one day (less than twenty-four hours) before the hearing.

(2)

The Validity of a State Statute Is Not Involved

There is no issue presented as to the validity of any state statute. Under the provisions of the California Code of Civil Procedure, section 1005, an adverse party is entitled to at least five days' written notice of hearing of a motion or application, but said statute also provides that the court or a judge thereof may prescribe a shorter time (Appendix, page 16). While a judge of the Superior Court did make an *ex parte* order shortening time of notice to one day in this action (R. 12), it is petitioner's contention that the validity or constitutionality of said statute is not in issue but that it was the action of the judge in shortening time of notice to one day and the action of the Superior Court in proceeding to hear and determine the application without petitioner having had a reasonable time to consult counsel or to prepare for the hearing or to resist the application on its merits which violated petitioner's constitutional right, which right was set up and claimed by petitioner.

(3)

The Date of the Judgment

The date of the judgment of the District Court of Appeal, affirming the orders appealed from, was August 22, 1947 (R. 69). Petition for rehearing was denied by the District Court of Appeal on September 10, 1947 (R. 75). A timely petition for hearing by the California Supreme Court was filed by petitioner and denied by order made and filed on October 20, 1947 (R. 75).

Under California law, an order of the Supreme Court denying a petition for hearing in the Supreme Court after judgment in the District Court of Appeal makes such judg-

ment a final judgment by the highest court in the state in which decision could be had, and all remedies in the state courts have been exhausted. (California Constitution, Art. VI, Sec. 4, 4(c); Rule 28 (a) (e). Rules on Appeal. Appendix, pages 16-17). The judgment of the District Court of Appeal became final on October 20, 1947 within the meaning of the Judicial Code, Section 237(b) [Title 28 U. S. C., Section 344(b)]. The writ of certiorari should properly be addressed to the District Court of Appeal. The time limit for applying to this Court for relief commenced to run on October 20, 1947, at which date the California Supreme Court denied the petition for hearing. (*American Railway Express Co.* v. *Levee,* 263 U. S. 19; 68 L. Ed. 140).

(4)

Nature of Case and Rulings of Courts Below

The nature of the case and the rulings of the courts below are adequately set forth herein in the Summary and Short Statement of The Matter Involved, reference to which is hereby made.

The cases hereinafter cited under the heading "A Substantial Federal Question Is Involved" are believed to sustain jurisdiction in that such cases also show that a claim of denial of due process of law under the Fourteenth Amendment presents a Federal question conferring jurisdiction on this Court under Judicial Code, section 237(b) [U. S. C. section 344(b)].

(5)

A Substantial Federal Question Is Involved

The Federal question is substantial and is one which this Honorable Court should exercise its jurisdiction to review by writ of certiorari:

(a) In setting aside the divorce judgment without requiring that petitioner be given reasonable notice of the hearing, the Superior Court unconstitutionally exercised authority. (*Zucht* v. *King*, 260 U. S. 174; 67 L. Ed. 194).

(b) The Federal question presented requires analysis and exposition. (*Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U. S. 710; 67 L. Ed. 1194).

(c) In determining the issue of whether the divorce judgment should be set aside, the state court was bound to proceed in such manner that all of the substantial rights of the parties under the United States Constitution and Federal law would be protected. Whether it did so raises a Federal question reviewable under Sec. 237(b) of the Judicial Code, 28 U. S. C., Sec. 344(b).

Garrett v. *Moore McCormack Co.*, 317 U. S. 239; 87 L. Ed. 239.

Broad R. P. Co. v. *South Carolina ex rel. Daniel*, 281 U. S. 537; 74 L. Ed. 1023.

Cheseboro v. *Los Angeles Co. Flood Control Dist.*, 306 U. S. 459; 83 L. Ed. 921.

Hansberry v. *Lee*, 311 U. S. 32; 85 L. Ed. 22.

(d) Aside from other considerations, a question of whether a litigant has been deprived of the fundamental right of due process of law, and in particular the right to

reasonable and adequate notice of hearing in a judicial proceeding, is intrinsically important and substantial.

Milk Wagon Drivers Union v. *Meadow Moor Dairies, Inc.*, 312 U. S. 287; 85 L. Ed. 836.

(6)

The Federal Question Was Raised in the Courts Below

Petitioner raised the Federal question sought to be reviewed herein in the court of first instance (Superior Court) at the commencement of the hearing on respondent's application to set aside the divorce judgment on January 26, 1946 (R. 22, 36). The method of raising the question was by special appearance to contest the jurisdiction of the court to proceed with the hearing or to rule on the application on the ground that the time of the notice was insufficient and unreasonable (R. 22-23, 36, 38-39). The question was again raised by petitioner by an application or motion in the Superior Court to vacate and set aside the order previously made vacating and setting aside the divorce judgment for the purpose of allowing petitioner to present evidence and to be heard on the merits, which application or motion was made to the Superior Court by petitioner and denied on March 5, 1946 (R. 27-29, 35). The basis of petitioner's said application or motion was that petitioner had had no opportunity to be heard on the merits of respondent's application, that petitioner was taken by surprise, and that petitioner's purpose in making said application was to permit her to file affidavits and to be heard on the merits (R. 27-29, 48).

On appeal from said orders of the Superior Court to the District Court of Appeal petitioner, in her opening brief (pages 24-28), reply brief (pages 35-37), and in oral argument, contended that the Superior Court lacked jurisdiction to vacate and set aside the divorce judgment because of in-

sufficiency of notice and that the order vacating and setting aside the divorce judgment violated petitioner's constitutional right to due process and was void. In her petition for rehearing in the District Court of Appeal (pages 2-3), petitioner pointed out to that court that it had in its opinion erroneously held that jurisdiction of the court to make said order, which required adequate notice of hearing, was a matter of discretion. In said petition (pages 6-7), petitioner also pointed out that the District Court of Appeal in its opinion was in error in holding that petitioner's application to vacate the order setting aside the divorce judgment constituted an opportunity for a hearing or a hearing on the merits.

In her petition for hearing in the California Supreme Court, petitioner made but two points: (1) that the Superior Court lacked jurisdiction to make the order setting aside the divorce judgment because of the insufficiency of notice of hearing and absence of due process of law, and (2) that petitioner's motion to set aside the previous order did not confer jurisdiction to make nor did it validate such previous order. The petition was denied without opinion, two justices voting for a hearing.

The opinion of the District Court of Appeal affirming the orders appealed from (R. 69-74; also reported in 81 Advance California Appellate Reports 372) passed upon the federal question of jurisdiction (whether notice was sufficient to constitute due process of law) as follows:

> "The record herein discloses no abuse of discretion in the vacation of the default interlocutory judgment, either in respect to the matter itself, notice and conduct of the hearing, jurisdiction, consideration of the supporting affidavit, or otherwise. No prejudicial error has been shown and the various contentions of appellant are untenable" (R. 73).

Except for the above brief reference to the federal question, the opinion ignored petitioner's contentions in that connection. The opinion purported to dispose of the question of adequacy of notice of the hearing of respondent's application to set aside the divorce judgment with the following reference to the hearing of petitioner's motion for an order vacating the previous order for the purpose of allowing petitioner to be heard on the merits, if and after petitioner's motion were granted, as follows:

> "The same matter, as hereinbefore indicated, was again brought to the trial court's attention by way of the second motion seeking to vacate the first order. At this second hearing, although the wife did not appear in person, the appellant had full opportunity to present, and must be deemed to have presented, all matters which were in any manner pertinent to the issue." (R. 74).

The Question Presented

The only question presented to this court is whether the order vacating and setting aside the divorce judgment was made upon such unreasonable and inadequate notice as to deprive petitioner of her right to a hearing on the merits, namely her right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Reasons Relied On for Allowance of Writ

Petitioner contends that a review of the federal question presented should be granted by certiorari under Rule 38, paragraph 5 (a), Supreme Court Rules, in that the state court has decided a federal question of substance in a way not in accord with and contrary to applicable decisions of this court.

Without doubt one of the fundamental rights under the due process clause of the Fourteenth Amendment, and indeed an inherent right under the principles of our juris-

prudence, is that a litigant is entitled to reasonable notice and the right to be heard before any court deprives him of a property or other right. This court is no doubt well aware of the numerous cases enunciating and applying the principle to various situations. As this court said, in *Roller* v. *Holly*, 176 U. S. 398, 409 (44 L. Ed. 520, 525) in holding that a Texas statute was unconstitutional as applied to the facts therein involved:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose."

In *Anderson National Bank* v. *Luckett*, 391 U. S. 233, at page 246, (88 L. Ed. 692, 705) this court more recently expressed the principle as follows:

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

It is settled beyond question in California that a judgment valid on its face cannot be vacated or set aside on application or motion under California Code of Civil Procedure section 473, or otherwise, except on due notice to the adverse party, unless notice be waived, and that a court lacks jurisdiction unless there has been due notice. (*Hicks* v. *Sanders*, 40 Cal. App. (2d) 211, 215; *Gill* v. *Peppin*, 41 Cal. App. 487, 492; *Brownell* v. *Superior Court*, 157 Cal. 703). Said code section was the basis for respondent's application to vacate the divorce judgment herein involved and the authority under which the Superior Court acted (R. 11-12, 36).

As more particularly shown hereinabove in petitioner's jurisdictional statement, petitioner raised the federal question involved in the state courts at every opportunity, but her constitutional right to reasonable notice and opportunity for a hearing on the merits was denied.

Petitioner believes that an extensive argument directed to the point that the notice of hearing involved in this case was so inadequate as to deprive her of due process of law would be inappropriate herein, and therefore she has in this petition attempted merely to present a showing sufficient to establish that a substantial federal question is involved whichrequires a review by certiorari by this court. Before concluding her petition, however, petitioner deems it appropriate to briefly summarize her contention that the notice given was so inadequate and unreasonable as to deprive her of due process of law.

The record, as hereinabove more particularly set forth, indisputably shows that notice of the hearing was served upon petitioner's counsel approximately twenty-four hours before the hearing, that petitioner herself was personally served with notice some time during the day prior to the date of hearing at Earlimart, Tulare County, California, which was approximately 150 miles distant from Los Angeles, the place of hearing of respondent's application for an order setting aside the divorce judgment. Furthermore, the record shows that respondent's affidavit setting forth the alleged facts in support of said application and which constituted the only notice to petitioner of what facts respondent would base his application on was served on petitioner's counsel at 5:05 P. M. on the evening before the morning of said hearing (January 26, 1946 at 10:30 A. M.), that petitioner's counsels' only opportunity to discuss the matter with petitioner before the hearing was briefly by telephone (R. 32), and that approximately one-half of the period of notice included the night of January 13. The

inadequacy of such notice for the protection of the right involved would appear to be obvious. Petitioner was deprived of her "day in court" and to a hearing on the merits, the divorce judgment previously rendered in her favor was set aside, and the order setting aside such judgment should be reversed.

In concluding her petition, petitioner desires to point out that the substantial federal question relied on in seeking review by this court was by its very nature necessarily involved in the judgment of the District Court of Appeal affirming the order of the Superior Court setting aside the divorce judgment. When petitioner's objection to the court's jurisdiction was raised in the Superior Court, that court necessarily had to determine that it had jurisdiction before ruling on respondent's application. Likewise, in affirming said order, the District Court of Appeal necessarily determined that jurisdiction existed even though in its opinion it so briefly touched upon that question. Petitioner's right to due process of law was as effectively over-rid-en as if that court had devoted its entire opinion to consideration of the federal question. Petitioner's right to review of that question by this court should not be measured by the inadequately considered and erroneous view of the state court.

Nor should this court be misled by the language of the opinion of the District Court of Appeal hereinabove adverted to which might tend to lead one unfamiliar with the record to believe that an alternative ground for decision existed, namely the references made in the opinion to the so-called "second hearing" and to the effect that petitioner allegedly "had full opportunity to present, and must be deemed to have presented, all matters which were in any matter pertinent to the issue . . . By stipulation of counsel the record at the first hearing was deemed a part of the record at the second hearing; the matter was argued

in extenso . . ." (R. 74). Such statement is incorrect. The so-called "second hearing" was a hearing only on petitioner's motion to vacate the previous order so that she might thereafter have a hearing on the merits of respondent's application to set aside the divorce judgment, on the ground that petitioner had been deprived of her right to reasonable notice. The only "issue" presented at the so-called "second hearing" was whether the court should vacate the prior order and permit a hearing on the merits because a petitioner had had no reasonable opportunity for such a hearing when the prior order was made (R. 47-68). The record also shows that the stipulation of counsel referred to in the opinion of the District Court of Appeal was only that the reporter's transcript of the hearing on the respondent's application to vacate the divorce judgment be deemed to be part of the record for the purpose of petitioner's motion. Said reporter's transcript contained arguments of counsel only (R. 47, 36-46). There was not, as the language of the opinion implies, any argument during the so-called "second hearing" on the question of whether or not the divorce judgment should have been set aside (R. 47-68). As petitioner's said motion was denied she had no opportunity whatsoever at that "hearing" or any other for any hearing on the merits. In any event, whether petitioner at any time had a reasonable opportunity to be heard on the merits is the federal question presented herein.

An examination of the record hereinabove referred to, will show that the District Court of Appeal was in error in employing such language in its opinion.

An additional reason why no alternative ground for the decision of the District Court of Appeal exists is that if the Superior Court had no jurisdiction to make the order setting aside the divorce judgment, such jurisdiction could not arise by a subsequent occurrence. In *Pennoyer* v. *Neff*, 95 U. S. 714, page 728, (24 L. Ed. 565, 570) likewise a "due

process" case, this court disposed of a contrary contention in these words:

> ". . . the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

Petitioner respectfully submits that this cause is within the jurisdiction of this court and that the substantial federal question presented is one which, in the exercise of sound judicial discretion, should properly be reviewed by this court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the District Court of Appeal, Second Appellate District, Division One, State of California, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said District Court of Appeal had in the case numbered and entitled on its docket, Civil No. 15738, *Ruth K. Armstrong, Applicant,* v. *Lee R. Armstrong, Respondent,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said District Court of Appeal be reversed by this court, and for such further relief as to this court may appear proper.

Dated December 10, 1947.

HUBERT T. MORROW,
Counsel for Petitioner.

JOHN C. MORROW,
Of Counsel.

APPENDIX

Section 1005, Code of Civil Procedure, State of California:

> "Notice of motion, when to be given. When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of the party notified has his office, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every full one hundred miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge or justice thereof, may prescribe a shorter time."

Constitution, State of California, Article VI, Sec. 4, Jurisdiction of Supreme Court:

> ". . . The said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the supreme court to itself for hearing and decision, as hereinafter provided . . ."

Article VI, Sec. 4(c). Transfer of cases between supreme and appellate courts:

> "The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court . . ."

Rules On Appeal, State of California, Rule 28, Hearing in Supreme Court:

> "(a) [Time within which court may grant hearing] Within 30 days in criminal causes, and 60 days in other causes, after the filing of a decision of the District Court of Appeal, the Supreme Court, on its own

motion, or on petition, may order the cause transferred to itself for hearing and decision."

"(e) [Determination of petition] A hearing in the Supreme Court after decision in the District Court of Appeal, may be granted by an order, signed by at least 4 justices assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the petition for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect."

SUBJECT INDEX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.
No. 525.

RUTH K. ARMSTRONG,

Petitioner,

vs.

LEE R. ARMSTRONG,

Respondent.

PETITIONER'S REPLY BRIEF.

The respondent's brief in opposition to petition for writ of certiorari contends that a Federal question was neither presented to nor decided by the highest state court in which a decision could be rendered, *viz.*, the District Court of Appeal, and that as a consequence, the Supreme Court of the United States has no jurisdiction to review the decision of the state court. Petitioner replies to such contentions herein.

The Federal Question Upon Which the Petition for Writ of Certiorari Is Based Was Necessarily Involved in the Determination of the Cause by the State Court and Was Determined by the State Court Adversely to Petitioner.

It is settled that where the highest state court in which a decision may be had considers a Federal question as properly raised in the appellate proceedings and passes upon or determines such question adversely to the Federal

claim, the Federal question is raised for the purpose of conferring jurisdiction on the United States Supreme Court, even where the Federal question was not raised in the trial court. (*Home Ins. Co. v. Dick,* 281 U. S. 397, 407, 74 L. Ed. 926, 933; *Whitfield v. Ohio,* 207 U. S. 431, 436, 80 L. Ed. 778, 782.)

In *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63, 67, 73 L. Ed. 184, 187, where the record of proceedings in the trial court was somewhat vague, this court, in passing on whether a Federal question had been properly raised, stated:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.
>
> "The appeal was not accompanied by an assignment of errors, but this was not an omission. The local practice does not recognize an assignment of errors as known in other jurisdictions; it merely requires the appellant to set forth in a printed brief 'the points to be relied on by him.' In the opinion delivered, which for present purposes is deemed part of the record, the appellate division stated distinctly that the relator's claim of invalidity was grounded on asserted repug-

nance to both the due process of law clause of the state Constitution and the clauses hereinbefore quoted from the 14th Amendment."

In *Murray v. Charleston,* 96 U. S. 432, 441-442, 24 L. Ed. 760, 761-762, the court stated the applicable rule as follows:

"The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded, under the shield of state legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the state court is of minor importance, if, in fact, it was raised and decided.

"In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the state court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided, and decided adversely to the federal right. Everywhere in our decisions it has been held that we may review the judgments of a state court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws or treaties of the United States, and deciding against that right. Very little impor-

> tance has been attached to the inquiry whether the federal question was formally raised. In Crowell v. Randell, 10 Pet. 368, it was laid down, after a review of almost all our previous decisions, 'That it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms, in *ipsissimis verbis,* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment.' "

In the case at bar, assuming for argument but not conceding that the Federal question was not raised in the trial court, the Federal question was raised by petitioner on appeal at the first opportunity in the District Court of Appeal in the only way it could be raised under California state practice, *viz.,* by a statement in petitioner's opening brief filed in the District Court of Appeal. There has never been any requirement in California for an assignment of errors on appeal, as there was at common law. (*Hutton v. Reed,* 25 Cal. 479; *Fawkes v. Reynolds,* 190 Cal. 204.) There was no requirement for any assignment of error on appeal when this appeal was taken. The Rules on Appeal for the District Court of Appeal, State of California, effective during this appeal, provide (Rule 15):

> "Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical 'assignments of errors' but should be concise headings which are generally descriptive of the subject matter covered."

At page 24 petitioner's opening brief contains the following heading, *viz.:*

"III.

THE TRIAL COURT LACKED JURISDICTION TO VACATE AND SET ASIDE THE INTERLOCUTORY DIVORCE JUDGMENT AND SUCH ORDER IS VOID."

The first paragraph under such heading is as follows:

"It is fundamental that there must be 'due notice' of judicial proceedings under the 'due process' clauses of the Federal and State Constitutions. If there is not, the court has no jurisdiction and its action is void."

Under such heading, at pages 25-27, in support of her contention that the notice was unconstitutional under the United States Constitution, petitioner cited and quoted from three leading decisions of the United States Supreme Court passing upon the sufficiency of notice or the opportunity to be heard under the due process clause of the Fourteenth Amendment to the United States Constitution, *viz., Hovey v. Elliott,* 167 U. S. 409; *Roller v. Holly,* 176 U. S. 398 and *Anderson National Bank v. Luckett,* 321 U. S. 233. Thus, the question was clearly presented on appeal to the state court in the required manner.

Petitioners said opening brief filed in the District Court of Appeal, as well as all other briefs and petitions filed by the parties in the state courts, are included in the certified record filed in this court, although not all are included in the printed record.

Respondent's statement in his brief in opposition, page 10, that the first time the constitutional question was

raised was in the petition for hearing by the Supreme Court of California is directly contrary to the fact, as hereinabove pointed out.

It is clear, as hereinabove shown, that petitioner did raise the Federal question at the first opportunity in the District Court of Appeal. It is also clear that since the trial court's jurisdiction to make the order in question depended on whether or not petitioner had been given a reasonable and adequate notice of hearing, as required by the due process clause of the United States Constitution, the District Court of Appeal necessarily had to and must have considered the Federal question and determined it.

In its opinion the District Court of Appeal referred to petitioner's contentions regarding the jurisdictional question, that is the Federal question, as follows:

> "According to the appellant's brief the basic questions involved are * * * 'Whether the trial court had jurisdiction, in any event, to set aside and vacate the interlocutory divorce judgment.'" [R. 72.]
>
> "The record herein discloses no abuse of discretion in the vacation of the default interlocutory judgment, either in respect to the matter itself, *notice* and conduct of the hearing, *jurisdiction,* * * * or otherwise." [R. 73.] (Italics ours.)

While as pointed out in the petition for writ of certiorari, these references in the opinion of the District Court of Appeal to the Federal question are brief, they do show that that court considered and passed on the Federal question. There is no requirement, in any event, that the state appellate court pass on a constitutional question in terms. (*Consolidated Coal Co. v. Illinois,* 185 U. S. 203, 206-207, 46 L. Ed. 872, 875.) If there should be any

doubt in that connection, the certificate of the Hon. John M. York, Presiding Justice of said District Court of Appeal, dated February 18, 1948, and filed in this proceeding, reference to which is hereby made, shows that the Federal question was raised in and determined by the District Court of Appeal, which clarifies any possible ambiguity in that connection.

Petitioner respectfully submits that a substantial Federal question was properly raised in the state court, that the question was necessarily involved in the determination of the cause by the state court, that the question was considered by the highest state court in which a decision could be had and was determined by that court adversely to petitioner, and that this Honorable Court has jurisdiction to review and properly should review and reverse the judgment of the District Court of Appeal.

Dated: February 20, 1948.

HUBERT T. MORROW,
Counsel for Petitioner.

JOHN C. MORROW,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1947
No. 525

RUTH K. ARMSTRONG,

Petitioner,

vs.

LEE R. ARMSTRONG,

Respondent.

SUPPLEMENT TO PETITIONER'S REPLY BRIEF.

The certificate of the District Court of Appeal, State of California, signed by the Honorable John M. York, Presiding Justice, dated February 18, 1948, showing that the Federal question relied on by petitioner was raised and determined by the District Court of Appeal, the original of which certificate is on file in this proceeding and is referred to at page 7 of petitioner's reply brief filed herein, is set forth in this supplement to petitioner's reply brief for the court's convenience.

Certificate to the Supreme Court of the United States.

This is to certify that in the cause entitled 2nd Civil Number 15738, Ruth K. Armstrong, Plaintiff and Appellant, vs. Lee R. Armstrong, Defendant and Respondent, an appeal from certain orders of the Superior Court of Los Angeles County to the District Court of Appeal, Second Appellate District, Division One, State of California, the plaintiff and appellant, Ruth K. Armstrong raised and presented a Federal question, together with certain other questions, to this court for its decision. The Federal question so raised and presented was as follows: whether the order of the Superior Court, dated January 26, 1946 vacating and setting aside the divorce judgment, theretofore rendered in favor of plaintiff and appellant, was made upon such unreasonable and inadequate notice of hearing to plaintiff and appellant as to deprive plaintiff and appellant of her right to a hearing on the merits and to due process of law under the Fourteenth Amendment to the United States Constitution.

The Federal question so raised and presented was raised by an objection to jurisdiction. The plaintiff and appellant contended that the Superior Court had no jurisdiction to make the order vacating and setting aside the divorce judgment because the said order was made after a notice of hearing which was so short in time as to be unreasonable and inadequate under the circumstances, that plaintiff and appellant had no reasonable or adequate opportunity to prepare for or to contest the application for said order on its merits, and that the making of said order upon such notice deprived plaintiff and appellant of her right to due process of law under both the due process clause of the State Constitution and the due process clause

of the Fourteenth Amendment to the United States Constitution.

This court considered that the said Federal question was presented for decision and that its decision of the Federal question was necessary for the determination of the cause, and in rendering its decision this court considered, passed upon and decided the Federal question so raised and presented. In rendering its decision dated August 22, 1947, this court determined and decided that the notice of hearing in question was not so unreasonable or inadequate as to deprive plaintiff and appellant of due process of law under the Fourteenth Amendment to the United States Constitution, or under the due process clause of the State Constitution, and that the Superior Court had jurisdiction to make the said order.

Dated February 18th, 1948.

(Seal) JOHN M. YORK,

Presiding Justice, District Court of Appeal, Second Appellate District, Division One, State of California.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 525

RUTH K. ARMSTRONG,

Petitioner,

vs.

LEE R. ARMSTRONG,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

In order to correct inaccuracies and omissions in the statement of the petitioner, and for the purpose of presenting all of the facts that may be material to the consideration of the questions involved in relation to the two orders of January 26, 1946, and March 5, 1946, sought to be reviewed herein, the respondent deems it proper to make the following statement:

PRELIMINARY STATEMENT:

At the outset respondent points out that counsel for petitioner refers to and cites, and bases in large part, her contention that the alleged federal question was raised in the courts below, upon (a) her opening brief in the District Court of Appeal; (b) her reply brief; (c) her oral

argument before the Appellate Court; and (d) her petition for rehearing in the District Court of Appeal; none of which constitute any part of the record before this Honorable Court. (See Petition, pp. 8-9.)

DEFAULT INTERLOCUTORY JUDGMENT OF DIVORCE:

On June 19, 1945, a divorce action entitled Ruth K. Armstrong, plaintiff, vs. Lee R. Armstrong, defendant, was commenced in the Superior Court of the County of Los Angeles, State of California. The attorney of record for the plaintiff in said action was Marlan Proctor. The plaintiff alleged in said action that she was a resident of the County of Los Angeles, State of California. [R. 1.] Summons was served on the defendant in Los Angeles County on July 12, 1945. [R. 3.] On July 26, 1945, the default of the defendant was entered by the Clerk of said Superior Court, pursuant to Section 585, subdivision 2, Code of Civil Procedure of California. [R. 2.] An interlocutory judgment of divorce, being a summary judgment by default, was awarded to the plaintiff on August 14, 1945. [R. 4.] Said judgment awarded the custody of the minor children to the plaintiff, and an alleged property settlement agreement between the parties, dated June 15, 1945, was approved. [R. 4.]

MOTION TO SET ASIDE DEFAULT JUDGMENT:

On January 24, 1946, a notice of application to set aside and vacate said interlocutory judgment of divorce was filed in said Superior Court in said action by the defendant, Lee R. Armstrong, under the provisions of Section 473, Code of Civil Procedure of California. [R. 11.] Said notice of application stated that it would be heard on Saturday, January 26, 1946, at the hour of 10:30 o'clock A. M., in the department of the presiding judge

of said Superior Court [R. 11], and was based upon the grounds "that said judgment was made and entered in favor of the plaintiff and against the defendant in said action through and by reason of the mistake, inadvertence, surprise or excusable neglect of said defendant." [R. 11.]

ORDER SHORTENING TIME OF SERVICE:

At the time said notice of application was filed, and as a part thereof, and attached thereto, an order shortening time was made by Hon. Dudley S. Valentine, the presiding judge of said Superior Court, whereby it was ordered that the time for the service of said notice of application to set aside and vacate said interlocutory judgment of divorce be shortened to one day. Said order recited that good cause was shown therefor. [R. 12.] There was attached to said notice of application an affidavit of merits by the defendant, dated January 24, 1946. [R. 12.]

The statement of petitioner that the order shortening time for the service of the notice to set aside said default judgment to one day was obtained "without affidavit or other basis" [p. 2] is incorrect. The record shows that the court acted upon all of the papers in the case, including the notice of motion and the affidavit of merits, and further that the court had notice of the existing emergency under the six months' provision of Section 473 of the Code of Civil Procedure of California. (See Appendix.) [R. 38-39.]

SERVICE OF MOVING PAPERS:

On January 25, 1946, pursuant to said order shortening time, copies of said notice of application, said order shortening time attached thereto, said affidavit of merits, and of the proposed answer of the defendant and the cross-

complaint of the defendant in said action, were served on said Marlan Proctor, the attorney of record for the plaintiff in said action. [See Affidavit of Service, R. 21.] Thereafter, on the same day, the supporting affidavit of the defendant, Lee R. Armstrong, was served on Marlan Proctor, the attorney of record for the plaintiff. Receipt of service of said affidavit was acknowledged by said attorney of record for the plaintiff on January 25, 1946. [R. 21, top of page.] While the specific time on the receipt is noted as "5:05 P. M.," the record shows that the affidavit was taken to the office of the attorney for plaintiff at 4:35 P. M., who was in his office behind closed doors and did not accept service until 5:05 P. M. [R. 40, 53, 89-90.]

The moving papers were also served on the plaintiff personally on January 25, 1946. [R. 22, 27.] While service on the plaintiff was made in Tulare County, California, she was there temporarily only, as her residence was at 710 Lincoln Street, City of Burbank, Los Angeles County, California. [R. 13, bottom of page.]

SUPPORTING AFFIDAVIT OF DEFENDANT:

The supporting affidavit of the defendant, dated January 25, 1946 [R. 13-21], set forth the facts upon which he based said application, showing, among other things, that commencing about 1942 the plaintiff, without the knowledge of the defendant, surreptitiously began and carried on an illicit association with one Earl Francis Cutter, and that she had broken up her home with the defendant on that account, and had taken an unconscionable advantage of the defendant's mental and physical illness resulting from the domestic situation, in order to obtain said divorce and said property settlement agreement. Said affidavit further set forth the facts showing how the defend-

ant discovered the adulterous relationship between his wife and said Earl Francis Cutter as the result of a trip made by said plaintiff and said Cutter in an automobile across the United States and return in November and December, 1945, living and staying together in the illicit relationship of man and wife, although said default judgment was merely an interlocutory judgment of divorce, and that upon their return from said trip the plaintiff and said Cutter moved into and lived together in the former residence of the plaintiff and defendant at 710 Lincoln Street, in the City of Burbank, Los Angeles County, California, where the plaintiff had left the minor children of the parties in the care of a housekeeper. There were attached to said affidavit photostatic copies of hotel registrations in the Hotel Winthrop, Tacoma, Washington, and The St. Michael Hotel, Prescott, Arizona, relating to said allegations of adultery in 1943 and 1945. [R. 13-21.]

APPEARANCE OF PLAINTIFF'S ATTORNEY AT HEARING:

The attorney of record for plaintiff appeared at the appointed time and place in response to the notice of application to set aside said default judgment on January 26, 1946, at 10:30 o'clock A. M. [R. 36.] The plaintiff did not appear in person. Whether she was available and might have appeared had she so elected, is indicated by the following statements by counsel at the hearing:

> "Mr. Shoemaker: * * * she left Earlimart and came to Burbank and she was in communication early last evening with her attorney in Burbank and she had from that time more than twelve hours within which to have made any showing she cared to make in reference to this matter. As far as I have observed she is not present but she was in conference with her attorney last night.

Mr. Proctor: She is not present and I haven't seen her personally and she didn't call me early last evening.

Mr. Shoemaker: I have information definitely that she [fol. 77] called Mr. Proctor around 4 o'clock yesterday afternoon from Earlimart and she left practically immediately for Los Angeles and was in conference with him approximately at 7 o'clock last night at his office in Burbank." [R. 39-40.]

Mr. Proctor made no reply to that statement.

It would appear that Mr. Proctor, by his silence, acquiesced in the definite statement by counsel regarding the availability of the plaintiff, had she desired to appear. Counsel for plaintiff offered no evidence, either written or oral, and made no request whatever of the court for any postponement or continuance. [R. 36-46.]

HEARING ON JANUARY 26, 1946:

Instead of contesting the application upon the merits, counsel for plaintiff elected to make what he characterized as a special appearance "for the purpose of contesting the jurisdiction of the court to proceed at this time and I am here for that purpose only." [R. 36.]

ABSENCE OF ANY OBJECTION ON FEDERAL GROUNDS:

Counsel for plaintiff made no objection to the hearing or proceeding on any federal ground. He failed to mention any claim of lack of due process or any constitutional right, and did not make any objection or claim on any such ground. [R. 36-46.]

JURISDICTIONAL QUESTIONS BASED ON STATE LAW:

His objections were based entirely on alleged defects and irregularities in regard to procedural matters under the statutes of California, such as the manner and time of service of the moving papers, the sufficiency of notice, the authority of the court to shorten the time of service, the sufficiency of the supporting papers, and he argued the general objection that the court was without jurisdiction to proceed because of such claimed defects and irregularities. [R. 36-46.]

Counsel for plaintiff also argued at the hearing on January 26, 1946, that the six months' jurisdictional period to set aside the default judgment under Section 473, Code of Civil Procedure of California, commenced to run at the time of the entry of the default judgment on August 16, 1945, instead of at the time of the entry of the default by the Clerk of said Superior Court on July 26, 1945, and he argued that there was no emergency. [R. 43-44.] Counsel for defendant cited cases indicating that the jurisdictional period commenced to run at the time of the entry of default by the Clerk, in which event the period would expire on January 26, 1946, the date of the hearing. [R. 37.]

ORDER OF JANUARY 26, 1946:

The court concluded that notice and the moving papers were duly served and were sufficient, and that the court had jurisdiction to proceed, and granted the defendant's motion to set aside said judgment, and the defendant was given leave to file his answer and cross-complaint. [R. 46, 23-24.]

PLAINTIFF'S MOTION FOR REHEARING:

Twelve days later, on February 7, 1946, the plaintiff, Ruth K. Armstrong, filed a motion in said Superior Court to set aside the order vacating said default judgment and for a rehearing. [R. 27-38.] That motion was made "for the purpose of permitting a rehearing of defendant's said motion to set aside said interlocutory judgment of divorce, and permitting plaintiff to file and present affidavits at said hearing on the merits of said motion in opposition to defendant's said motion" [R. 28], and upon the ground that said order of January 26, 1946, was "taken against plaintiff through her surprise and without any opportunity on the part of plaintiff or her attorney to prepare for or present any defense to said motion of defendant upon the merits thereof." [R. 28.] Said motion was not based upon any claim or any ground that any constitutional right had been violated, or that any federal question was presented.

On said motion the plaintiff waived any objection to claim that such a rehearing was not presented to or heard by the court, or had, within the time required by law, and thereby virtually conceded that the court had power to entertain the motion which was made on January 26, 1946. [R. 28.] The plaintiff's said motion was based upon "all of the files, papers, minutes and proceedings herein." [R. 28.] Such papers and proceedings included the entire record of the hearing on January 26, 1946, which was deemed to be a part of the record before the court by stipulation. [R. 47.]

HEARING ON PLAINTIFF'S MOTION FOR REHEARING, MARCH 5, 1946:

The plaintiff's motion for rehearing, filed on February 7, 1946, came on for hearing on March 5, 1946, more than five weeks after the order was made on January 26, 1946, setting aside the default judgment. The motion for rehearing was entertained by the court and was fully presented and argued *in extenso*, as stated in the next to the last paragraph of the opinion of the District Court of Appeal. [R. 74.] The plaintiff did not appear in person at the hearing of her motion for rehearing on March 5, 1946.

FAILURE OF PLAINTIFF TO MAKE ANY SHOWING:

The plaintiff wholly failed to present or indicate by any affidavit or pleading what she proposed to prove by way of opposition to the defendant's motion. The plaintiff's motion for rehearing was not supported by any proposed showing by affidavit or other pleading, as required by Section 473, Code of Civil Procedure.

PLAINTIFF HAD FULL AND FAIR OPPORTUNITY:

The Reporter's Transcript of the proceedings on motion for rehearing heard on March 5, 1946, comprises 36 pages [R. 47-68] and shows that the trial court fully reviewed the matter on March 5, 1946, and that the plaintiff had a full and fair opportunity to present any proposed opposition to defendant's motion at said hearing on March 5, 1946, but wholly failed to do so.

ORDER OF MARCH 5, 1946:

At the conclusion of the plaintiff's motion for rehearing on March 5, 1946, the court denied said motion. [R. 35, 68.]

PLAINTIFF APPEALED FROM BOTH ORDERS:

Thereafter the plaintiff appealed from both orders, namely, the order of January 26, 1946, vacating the default judgment, and the order of March 5, 1946, denying plaintiff's motion to set aside said order of January 26, 1946, and for rehearing. Both of said appeals were considered under one record and one set of briefs, Civil Case No. 15738, Second District, Division One, District Court of Appeal, State of California. [R. 7, 8, 69.]

STATE RECORD ON APPEAL PRESENTED NO FEDERAL QUESTION:

The state record on these appeals presented no claim whatever that any federal question was involved or that appellant had been deprived of any of her rights under the Constitution of the United States. There was nothing in the record upon which the appeals were taken indicating that any right or privilege under the federal Constitution was specially set up or claimed, and no claim was made in the record that any right under the federal Constitution had been violated. The first time the constitutional question was raised was in the petition for hearing by the Supreme Court of California, after decision by the District Court of Appeal, and that petition was denied without opinion or reference to the question. [R. 76, 75.]

BASIC QUESTIONS PRESENTED BY APPELLANT:

The opinion of the Appellate Court quoted from appellant's brief as follows:

> "According to the appellant's brief the basic questions involved are 'Whether the trial court abused its discretion' in granting respondent's motion to set aside the interlocutory judgment, and in later refusing, on appellant's motion, to vacate such order; and

'Whether the trial court had jurisdiction, in any event, to set aside and vacate the interlocutory divorce judgment.' The brief concedes that the matter is one of discretion, but alleges that the respondent husband 'made no adequate showing that his default was taken and judgment taken against him through his mistake, inadvertence, surprise or excusable neglect within the meaning of Code Civ. Proc. Section 473, or otherwise." [R. 72.]

DETERMINATION OF BASIC QUESTIONS PRESENTED BY APPELLANT:

In deciding said basic questions so presented by appellant (petitioner), the Appellate Court said:

"The record herein discloses no abuse of discretion in the vacation of the default interlocutory judgment, either in respect to the matter itself, notice and conduct of the hearing, jurisdiction, consideration of the supporting affidavit, or otherwise. No prejudicial error has been shown and the various contentions of appellant are untenable." [R. 73.]

DECISION ON APPEAL FROM ORDER OF MARCH 5, 1946:

In deciding the questions presented by appellant in regard to her appeal from the order of March 5, 1946, the Appellate Court said:

"The same matter, as hereinbefore indicated, was again brought to the trial court's attention by way of the second motion seeking to vacate the first order. At this second hearing, although the wife did not appear in person, the appellant had full opportunity to present, and must be deemed to have presented, all matters which were in any manner pertinent to the issue.

"[Fol. 137.] Nor is there any merit in appellant's claim that 'The trial court abused its discretion in

denying appellant's motion for an order vacating and setting aside the order setting aside the interlocutory divorce judgment.' No abuse of discretion is disclosed by the record which reveals a substantial showing justifying the order made. By stipulation of counsel the record at the first hearing was deemed a part of the record at the second hearing; the matter was argued *in extenso,* and the trial court again came to the conclusion 'that in equity the matter should be disposed of after a hearing on the merits,' rather than by a default judgment." [R. 74.]

Summary of the Argument.

Point A.

The orders appealed from, and sought to be reviewed by the Supreme Court, were grounded on the construction and application of the state Constitution and state statutory law, and on general principles of law and equity, irrespective of any federal aspects of the case.

Point B.

The record fails to show that any federal question was decided by the state court, either expressly or by necessary intendment, or that the decision of the federal question was necessarily involved in the determination of the cause by the state court.

Point C.

Where the federal question involves a right which must have been specially set up or claimed under Judicial Code, Section 237, subsection (b), it must appear from the state record that it was so set up or claimed in proper manner and time.

POINT D.

A claim of federal right asserted only in a brief filed in the state appellate court is not sufficient to raise a federal question.

POINT E.

A federal question is not properly set up or claimed when presented for the first time in petition for hearing by the highest court of the state, after judgment by the intermediate appellate court, the petition being denied without opinion or reference to the question.

POINT F.

The orders sought to be reviewed were decided upon and are supported by independent and adequate non-federal grounds.

POINT G.

The claim that a federal question is presented is unsubstantial and is so devoid of merit as to be frivolous. It was obviously only a state question.

ARGUMENT.

POINT A.

Only Nonfederal Questions Are Involved in the Case and the Supreme Court Is Without Jurisdiction to Review the Orders of the State Court.

The order was made by the trial court on January 26, 1946, setting aside the default judgment, after considering and holding untenable the objections and contentions made by counsel for plaintiff (petitioner), as follows:

(1) The general objection that the court had no jurisdiction to proceed. [R. 36.]

(2) That the moving papers were not served upon the attorney of record for the plaintiff personally. [R. 38.]

(3) That the court abused its discretion in shortening time of service to one day. [R. 38.]

(4) That the attorney of record for plaintiff was not served within a period of twenty-four hours. [R. 39.]

(5) That the supporting affidavit was served later in the day and not at the same time that the notice of motion was served. [R. 40.]

(6) That counsel for plaintiff was placed in a position where he could not adequately meet the allegations made by the defendant and that therefore he must "stand on the technical grounds" [R. 42] and object to the jurisdiction of the court. [R. 42.]

The applicable state statutes, and the applicable state constitutional provision, under which the regularity and

validity of the various procedural matters involved were determined are here set forth:

Entry of default by clerk:

Code of Civil Procedure, Sec. 585, Subd. 2. (See Appendix.)

Relief from judgment taken by mistake, excusable neglect, etc.:

Code of Civil Procedure, Sec. 473, third section. (See Appendix.)

Order shortening time:

Code of Civil Procedure, Sec. 1005. (See Appendix.)

Service of papers:

Code of Civil Procedure, Sec. 1011, Subd. 1. (See Appendix.)

Due process clause under state Constitution:

"No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property without due process of law."

Constitution of California, Art. I, Sec. 13.

As indicated by the record [R. 36-46], and by the order granting the motion to set aside the default judgment [R. 22], the trial court found that the service of the papers was regular and valid, that notice was sufficient, and that the court had jurisdiction to proceed, and held that the objections and contentions of counsel for plaintiff were untenable.

The order shortening time recited that good cause appeared therefor [R. 12], and in *California etc. Bank v. Graves,* 129 Cal. 649, in upholding the exercise of the power to shorten the time as given by Section 1005 of the Code of Civil Procedure, the court said:

> "It is claimed that the court erred in shortening the time for hearing the application for the writ from five to three days. The power to shorten the time is given by section 1005 of the Code of Civil Procedure. The order of the court reads: 'Good cause appearing to me therefor, it is ordered,' etc. There is nothing in the record to dispute this recital, and we must presume that the necessity for the order was made to appear, and that the power was rightly exercised." (P. 650.)

No showing was made by petitioner disputing that recital in the order shortening time, and on appeal all presumptions and intendments are in favor of and support the regularity and correctness of the order.

Cockrill v. Clyma, 98 Cal. 123;

Thorndyke v. Jenkins, 61 Cal. App. (2d) 119.

The burden was on the petitioner to show an abuse of discretion, which she failed to do.

Thorndyke v. Jenkins, supra.

Due and legal notice was given and the papers were properly served. Service on the attorney of record was good, and service on the party was unnecessary.

Reynolds v. Reynolds, 21 Cal. (2d) 580;

Glesby v. Glesby, 73 Cal. App. (2d) 301;

Code of Civil Procedure, Sec. 1011, Subd. (1).

The objection to the service of the supporting affidavit was untenable.

Hecq v. Conner, 203 Cal. 504.

The law disregards fractions of a day in giving notice.

Gray v. Maier & Zobelein Brewery, 2 Cal. App. 653;

Cosgriff v. Board of Election Commrs., 151 Cal. 407;

Kelly v. State Personnel Board, 31 Cal. App. (2d) 443.

The six months' jurisdictional period under Section 473, Code of Civil Procedure commenced to run at the time of the entry of default by the clerk on July 26, 1945. (*Mac Beth v. Mac Beth,* 219 Cal. 47.) The motion itself must be made and the action of the court requested on it within the six months.

In re Morehouse, 176 Cal. 634.

On plaintiff's motion for rehearing, based on surprise, under Section 473, Code of Civil Procedure, she was required to make a showing by affidavit or other pleading of her proposed opposition to vacating the default judgment, if the order of January 26, 1946, should be set aside, but she wholly failed to comply with that requirement.

Bailiff v. Hildebrandt, 47 Cal. App. 564.

The order vacating default judgment was sustained upon general principles of law and equity, and according to established state law. [See statement in opinion of appellate court, bottom half page R. 72.]

The construction, application and effect of the state Constitution and statutes in the state courts are for the state courts to determine, and questions relating thereto are state and not federal questions.

Memphis & C. Ry. Co. v. Pace, 282 U. S. 241, 75 L. Ed. 315;

Levy v. Superior Court of City and County of San Francisco, 167 U. S. 175, 42 L. Ed. 126;

Lem Woon v. Oregon, 229 U. S. 586, 57 L. Ed. 1340;

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678;

Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616;

Enterprise Irrig. Dist. v. Farmers Mut. Canal, 243 U. S. 157, 61 L. Ed. 644;

Goodrich v. Ferris, 214 U. S. 71, 53 L. Ed. 914;

Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 43 L. Ed. 460;

Wilson v. North Carolina, 169 U. S. 586, 42 L. Ed. 865;

Allen v. Georgia, 166 U. S. 138, 41 L. Ed. 949;

Los Angeles Farming & Milling Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736;

Turner v. Board of Com'rs, 173 U. S. 461, 43 L. Ed. 768;

California Nat. Bank v. Thomas, 171 U. S. 441, 43 L. Ed. 231;

Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232;

Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478;

Kammerer v. Kroeger, 299 U. S. 302, 81 L. Ed. 253.

The construction and application of state laws are for the state courts, and the decisions of those courts are conclusive upon the Supreme Court in so far as the state aspect of the matter is concerned.

Supreme Lodge, K. P., v. Meyer, 265 U. S. 30, 68 L. Ed. 885;

Quong Ham Wah Co. v. Industrial Acc. Comm. of California, 255 U. S. 445, 65 L. Ed. 723;

Iowa Central Ry. Co. v. Iowa, 160 U. S. 389, 40 L. Ed. 467.

In *Leeper v. Texas,* 139 U. S. 462, 35 L. Ed. 225, the court stated:

> "Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied."

POINT B.

No Federal Question Was Decided by the State Court, and None Was Necessarily Involved in the Determination of the Cause by the State Court.

In *Memphis Natural Gas Co. v. Beeler,* 315 U. S. 649, 86 L. Ed. 1090, the court stated:

> "Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state Supreme Court to be in issue, we must dismiss the appeal for want of jurisdiction." (86 L. Ed., p. 1094.)

No definite issue as to any federal claim or question was deducible from the record before the state court, and it cannot be held to have disposed thereof by its decision which is entirely silent in regard to any such claim or question.

Seaboard A. L. R. Co. v. Duvall, 225 U. S. 477, 56 L. Ed. 1171;

Live Oak Water Users' Ass'n v. Railroad Comm. of California, 269 U. S. 354, 70 L. Ed. 305;

Zadig v. Baldwin, 166 U. S. 485, 41 L. Ed. 1087;

Chicago & N. W. Ry. Co. v. Chicago, 164 U. S. 454, 41 L. Ed. 511;

Southwestern Bell Tel. Co. v. Oklahoma, 303 U. S. 206, 82 L. Ed. 751;

Mellon v. O'Neil, 275 U. S. 212, 72 L. Ed. 245.

The reviewable character of the decision of the highest state court and what was drawn in question and decided may be ascertained from its judgment and opinion. (*Burbank v. Ernst,* 232 U. S. 162, 58 L. Ed. 551.) The opinion of the state court may be regarded and considered by the Supreme Court as part of the state record.

Indiana v. Brand, 303 U. S. 95, 82 L. Ed. 685.

POINT C.

No Federal Question Was Raised and No Constitutional Right Was Set Up or Claimed in an Adequate Manner or at an Appropriate Time.

The specific question sought to be reviewed was not set up or claimed in proper manner or time. (*Keokuk & H. Bridge Co. v. Illinois,* 175 U. S. 626, 44 L. Ed. 299; *F. G. Oxley Stave Co. v. Butler County,* 166 U. S. 648, 41 L. Ed. 1149.) In the case last cited, the court stated:

> "The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court." (41 L. Ed. p. 1152.)

Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 37 L. Ed. 1008;

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 86 L. Ed. 1090;

Miller v. Cornwall, 168 U. S. 131, 42 L. Ed. 409;

Capital Nat. Bank of Lincoln v. First Nat. Bank of Cadiz, 172 U. S. 425, 43 L. Ed. 502;

Michigan Sugar Co. v. Dix, 185 U. S. 112, 46 L. Ed. 829;

Thomas v. Iowa, 209 U. S. 258, 52 L. Ed. 782;

Louisville & N. R. Co. v. Smith, Huggins & Co., 204 U. S. 551, 51 L. Ed. 612;

El Paso & S. W. R. Co. v. Eichel & Weikel, 226 U. S. 590, 57 L. Ed. 369;

Hiawassee River P. Co. v. Carolina Tenn. P. Co., 252 U. S. 341, 64 L. Ed. 601.

The challenge below to the jurisdiction of the court was entirely referable to the state Constitution and

statutes and did not constitute any assertion of a federal right. (*Bowe v. Scott,* 233 U. S. 658, 58 L. Ed. 1141.) In the case last cited the court stated:

> "But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court." (58 L. Ed. 1145.)

Kipley v. Illinois, 170 U. S. 182, 42 L. Ed. 998;

New York Cent. & H. River R. Co. v. City of New York, 186 U. S. 269, 46 L. Ed. 1158;

Hamblin v. Western Land Co., 147 U. S. 531, 37 L. Ed. 267;

Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. Ed. 171;

Marvin v. Trout, 199 U. S. 212, 50 L. Ed. 157;

Clarke v. McDade, 165 U. S. 168, 41 L. Ed. 673.

The specific federal question which it is sought to have reviewed must have been drawn in question in the state court.

Bailey v. Anderson, 326 U. S. 203, 90 L. Ed. 3.

POINT D.

A Claim of Constitutional Right Is Not Sufficient to Raise a Federal Question When Merely Asserted in a Brief or Oral Argument in the Appellate Court.

Zadig v. Baldwin, 166 U. S. 485, 41 L. Ed. 1087;

New York Central & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. Ed. 1158;

Sayward v. Denny, 158 U. S. 180, 39 L. Ed. 941.

POINT E.

An Unsuccessful Petition to the Highest State Court Which Asserts a Claim of Constitutional Right, After Judgment by the Intermediate Appellate Court, Is Not Sufficient to Raise a Federal Question.

A federal question is raised too late where it is first presented to the state court on petition or motion for rehearing which is denied or dismissed by the state court, without opinion or reference to the question.

Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530;

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231;

Live Oak Water User's Assn. v. Railroad Comm. of California, 269 U. S. 354, 70 L. Ed. 305;

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 47 L. Ed. 480;

Miller v. Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409;

Sayward v. Denny, 158 U. S. 180, 39 L. Ed. 941.

A federal claim is made too late where first made in an unsuccessful petition to the highest court for review of the judgment of an intermediate appellate court of the state.

El Paso & S. W. R. Co. v. Eichel & Weikel, 226 U. S. 590, 57 L. Ed. 369;

Chicago I. & L. Ry. Co. v. McGuire, 196 U. S. 128, 49 L. Ed. 413;

St. Louis & S. F. R. Co. v. Shephard, 240 U. S. 240, 60 L. Ed. 622;

Bowe v. Scott, 233 U. S. 658, 58 L. Ed. 1141.

POINT F.

The Orders of the State Court Are Supported by Independent and Adequate Non-federal Grounds.

Where independent non-federal grounds adequate to support the decision appear, the Supreme Court will not review the state judgment.

Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111;

Allen v. Arguimbau, 198 U. S. 149, 49 L. Ed. 990.

In the instant case, as pointed out above, the orders were sustained by the state court under the established law of the state based on principles of law and equity, the state Constitution and statutory laws, and no federal question was presented or discussed or decided.

Lynch v. N. Y. ex rel. Pierson, 293 U. S. 52, 79 L. Ed. 191;

Leathe v. Thomas, 207 U. S. 93 52 L. Ed. 118;

Fox Film Corp. v. Muller, 296 U. S. 207, 80 L. Ed. 158;

Utley v. City of St. Petersburg, 292 U. S. 106, 78 L. Ed. 1155;

Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 61 L. Ed. 644;

Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111.

POINT G.

The Claim That a Federal Question Is Presented is Frivolous Where It Is Obviously Only a State Question.

Kammerer v. Kroeger, 299 U. S. 302, 81 L. Ed. 253;

Quong Ham Wah Co. v. Ind. Acc. Comm., 255 U. S. 445, 65 L. Ed. 723;

Delmar Jockey Club v. Missouri, 210 U. S. 324, 52 L. Ed. 1080;

Wilson v. North Carolina, 169 U. S. 586, 42 L. Ed. 865;

Goodrich v. Ferris, 214 U. S. 71, 53 L. Ed. 914;

Bellingham Bay B. C. R. Co. v. New Whatcom, 172 U. S. 314, 43 L. Ed. 460;

Kennard v. Louisiana, 92 U. S. 90, 23 L. Ed. 478.

No federal question was properly raised in the state courts, no federal question was decided by the state courts, and it was not necessary to a determination of the case by the state courts that any federal question be decided, and the opinion is entirely silent in regard to any federal question.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in the Supreme Court, and that the petition for a writ of certiorari should be denied.

Dated: February 9, 1948.

JOHN STEWART ROSS,
Counsel for Respondent.

CLYDE C. SHOEMAKER,
Of Counsel.

APPENDIX.

Code of Civil Procedure, Section 585, subdivision 2:

"In other actions, if the defendant has been personally served and no answer or demurrer has been filed with the clerk or justice of the court within the time specified in the summons, or such further time as may have been granted, the clerk, in courts having a clerk, must enter the default of the defendant; and thereafter the plaintiff may apply to the court for the relief demanded in the complaint; * * *."

Code of Civil Procedure, Section 473, third section:

"The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken."

Code of Civil Procedure, Section 1005:

"When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of the party notified has his office, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every full one hundred miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge or justice thereof, may prescribe a shorter time."

Code of Civil Procedure, Section 1011, subdivision 1:

"The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office; or, if it is not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of not less than eighteen years of age, if his residence is in the same county with his office; and if his residence is not known, or is not in the same county with his office, or being in the same county it is not open, or there is not found thereat any person of not less than eighteen years of age, then by putting the same, inclosed in a sealed envelope, into the postoffice directed to such attorney at his office, if known; otherwise to his residence, if known; and if neither his office nor his residence is known, then by delivering the same to the clerk of the court, or to the justice where there is no clerk, for the attorney;".